Supreme Court, U.S.
FILED
SEP 22 1999
OFFICE OF THE CLERK

No. 99-42

In The

Supreme Court of the United States

CENTRAL NEWSPAPERS, INC.,

Petitioner,

v.

MICHAEL J. JOHNSON and McKINLEY KELLER,

Respondents.

On Petition For A Writ Of Certiorari To The Third Circuit Court Of Appeal Of The State Of Louisiana

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI BY – CAROL J. AYMOND, JR.

CAROL J. AYMOND, JR., in proper person
Louisiana Bar Roll Number 02626
Post Office Box 117
Bunkie, Louisiana 71322
(318) 346-6613

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Table Of Contents i

Table Of Authorities ii

Statement Of The Case 1

Summary Of Argument 6

Argument 6

Conclusion 12

TABLE OF AUTHORITIES

Page

CASES:

Carpenter v. State, 36 S.W. 900, 62 Ark. 286 (1896) 9

Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975), 95 S.Ct. 1029 (1974) 12, 13

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975 (1967) 12

Garrison v. Louisiana, 379 U.S. 64, 85 S.Ct. 209 (1964) 11

Hustler Magazine and Larry Flint v. Jerry Falwell, 485 U.S. 46, 108 S.Ct. 876 (1987) Decision (1988) 11

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507 (1967) 7

McKamey v. Roach, 55 F.3d 1236 (6th Cir. 1995) 7

Monitor Patriot Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621 (1971) 11

NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328 (1963) 12

New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 721 (1964) 11

Robertson v. California, 370 U.S. 660, 82 S.Ct. 1417 (1962) 10

State of Louisiana v. Amanda Neisler, 666 So.2d 1064 (1996), See rehearing 3/16/95, 655 So.2d 252..... 6

State v. Beavers, 382 So.2d 943 (La. 1980) 10

United States v. Associated Press, 52 F.Supp. 362 (1943) 12

TABLE OF AUTHORITIES – Continued

Page

United States v. Smith, 978 F.2d 171 (5th Cir. 1992) ...7, 8

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641 (1927) 12, 13

STATUTES:

LA. R.S. 15:1301, et seq. ..... *passim*

Federal Wiretap Act, 18 U.S.C., 2516(2)..... 7

18 U.S.C. Section 2510, et seq. 9

Federal Wiretap Act, 18 U.S.C., 2702(5).....8, 9

U. S. Constitution, First Amendment..... *passim*

U. S. Constitution, Fourth Amendment..... 8

U. S. Constitution, Fifth Amendment.....3, 4

U. S. Constitution, Eighth Amendment..... 10

U. S. Constitution, Fourteenth Amendment.... 8, 10, 13

LA Constitution, Art. I, s.20 10

STATEMENT OF THE CASE

On or about December 3, 1996, Michael J. Johnson and McKinley Keller filed almost identical civil law suits in the 12th Judicial District Court in and for the Parish of Avoyelles, State of Louisiana, against defendants, Carol J. Aymond, Jr. Avoyelles Publishing Company, Randy Decuir, John Doe (also known as "Alphonse") and Central Newspapers, Inc. These civil law suits were later consolidated.

Concerning Aymond, Johnson alleged the following in his petition, to-wit:

Paragraph 3:

"On November 6, 1996, defendant, CAROL AYMOND, JR., conducted a press conference in his law office in Bunkie, Louisiana."

Paragraph 4:

"At said press conference, defendant CAROL AYMOND, JR., distributed and/or disseminated copies of an illegally taped telephone conversation between plaintiff and McKinley "Pop" Keller, as well as copies of purported transcripts thereof, to reporters and spectators."

Paragraph 5:

"On November 7, 1996, defendant CAROL AYMOND, JR. did distribute and/or disseminate the contents of this illegally intercepted communication by sending a copy of the recording and/or a copy of the transcript of said recording to Steven Scheckman, Special Counsel to the Louisiana Judiciary Commission."

Paragraphs 3, 4, and 5 state the allegations made against defendant, Aymond, by Michael J. Johnson and McKinley Keller. Mr. Keller also complained of a press conference of November 13, 1996.

Aymond filed **"EXCEPTION OF UNCONSTITUTIONALITY, AND IN THE ALTERNATIVE, EXCEPTIONS OF PREMATURITY, NO CAUSE OF ACTION AND/OR NO RIGHT OF ACTION, AND OF VAGUENESS".**

Aymond specifically alleged the unconstitutionality of LA. R.S. 15:1301, et seq.

The civil law suit was assigned to William J. Bennett, Judge, 12th Judicial District Court, Division "B", for the Parish of Avoyelles, State of Louisiana. Honorable William J. Bennett, set Exception of Unconstitutionality, Exceptions of Prematurity, No Cause of Action and/or No Right of Action, and of Vagueness, for hearing on March 21st, 1997.

On May 20th, 1997, Judge William J. Bennett, Division "B", 12th Judicial District Court, assigned Written Reason for Judgment concerning the Exceptions of Unconstitutionality, Prematurity, No Cause of Action and/or No Right of Action, and Vagueness.

The District Judge held the following concerning the Exception of Unconstitutionality, et seq., to-wit:

> **"The Exception of Unconstitutionality be and is hereby conditionally granted, dependent upon the specific facts of this case, which may be revealed at trial and therefore referred to the merits based on the following."**

The District Judge went on to say in his Reasons for Judgment, that the statute was unconstitutional as imposing cruel and unusual punishment (a mandatory sentence of 2 to 10 years without the benefit of probation or parole for each count), unconstitutional as to cellular and/or cordless telephones, and conditionally a violation of the First Amendment right to free speech if the activity and communications discloses illegal conduct on the part of the public officials (a district judge and an Avoyelles Parish Police Jury member).

Johnson and Keller, thereafter, filed a Motion and Order for Appeal, which was granted from the Judgment rendered on May 20th, 1997, in which the Court held that the statute was unconstitutional as imposing cruel and unusual punishment, unconstitutional as to cellular and/or cordless telephones, and unconstitutional as violative of rights to free speech if the activity discloses illegal conduct, as all set forth in the Motion and Order of Appeal by both Johnson and Keller.

In an Answer filed by Aymond, Aymond claimed and pled his 5th Amendment Rights against self-incrimination, and any and all rights guaranteed to him by the United States Constitution and the Louisiana Constitution. Additionally, Aymond made no admission of wrongdoing or violations of LA. R.S. 15:1301, et seq.

On November 19th, 1997, the Supreme Court of the State of Louisiana issued the following Order, to-wit:

> **"Plaintiffs invoke the appellate jurisdiction of this court pursuant to La. Const. Art. V, § 5 (D), on ground that the district court declared LA. R.S. 13:1301, et seq., unconstitutional.**

Our independent review of the record reveals that the trial court's judgment never rendered the statute unconstitutional. While the trial court's judgment indicates it "conditionally" found the statutes unconstitutional, the judgment goes on to state that this finding is dependent "on the specific facts of this case, which will be revealed at trial." The judgment further states "the merits of the case and/or evidence presented at trial will decide the issue of constitutionality of LA. R.S. 15:1301, et seq."

Therefore, although the trial court's judgment makes certain references to the constitutionality of LA. R.S. 13:1301, et seq., it is clear these statements are dicta, since the court has not yet reached the merits of the case before it.

Accordingly, the appeals from this judgment filed in this court are dismissed, and the case is remanded to the trial court for further proceedings.

KNOLL, J. not on panel; recused.

New Orleans, Louisiana, this 19th day of November, 1997.

FOR THE COURT:

Bennet: J. Johnson
Justice, Supreme Court
of Louisiana"

Thereafter, both Johnson and Keller requested an order to stay all proceedings due to the fact that Aymond claimed his 5th Amendment Right of self-incrimination, and this hampered the progress of their civil law suit. The

Honorable William J. Bennett granted the Motion to Stay and proceedings have been stayed since that time.

Petitioners, Johnson and Keller, filed criminal charges against Aymond for violation of said statute, the matter was brought and heard before the Avoyelles Parish Grand Jury and a *No* True Bill was returned against Aymond.

There is no allegation that Aymond illegally obtained the information. Nor is there an allegation by Mr. Johnson or Mr. Keller that the alleged information is false; or the contents of the information. Petitioners only allege apparently an unlawful interception by an un-named person or persons.

Since these allegations occurred, petitioner Johnson was removed by the Louisiana Supreme Court from Judge, Division "A", 12th Judicial District Court, in and for the Parish of Avoyelles, State of Louisiana. The Louisiana Supreme Court found, in written reasons assigned, that Johnson was unfit (for reasons other than the case at hand) to serve. Thus, at this particular time, Johnson is no longer a public official, nor does he hold any public office; but, at the time the alleged incident occurred, Mr. Johnson was a district judge for the State of Louisiana. Mr. Keller was, at the alleged time that these alleged facts occurred, a member of the Avoyelles Parish Police Jury (the governing body of the parish) and still holds this office today as a parish public official.

SUMMARY OF ARGUMENT

Under **SUMMARY OF ARGUMENT**, LA. R.S. 15:1301-1312, the Electronic Surveillance Act of the State of Louisiana should be held unconstitutional, in that, it is in violation of the First Amendment of the United States Constitution and additionally violates the constitutional protections against cruel and unusual punishment.

ARGUMENT

LA. R.S. 15:1301-1312, as it is amended by the 1995 Legislature, attempts to regulate cordless telephone communications. Users of cordless telephones and other wireless devices have **"no reasonable expectation of privacy in their use of such devices which depend upon public airways for transmission."** Such use, is analogous to talking in a room full of people or shouting aloud in one's front yard amongst the neighbors surrounding one's home.

The Louisiana Supreme Court in *State of Louisiana v. Amanda Neisler, et al.*, 666 So.2d 1064, decided on January 16, 1996, states the following, to-wit: (see rehearing March 16th, 1995, 655 So.2d 252).

> **"In addition:**
>
> **We also consider whether cordless telephone transmissions are 'oral communication' as defined and protected by Louisiana Electronic Surveillance Act,** (see LSA R.S. 15:1301, et seq.) **After considering the relevance State and Federal Authority Statutory Law, we adjudge that the cordless telephone transmission at issue in**

> **this case are not protected (oral communications) under the Electronic Surveillance Act.** ***We further conclude that since such transmissions offer no reasonable expectation of privacy, they are not protected by pertinent provisions of the Louisiana or the Federal Constitutions."***

See also *McKamey v. Roach*, 55 F.3d 1236, in which the United States Court of Appeals, 6th Circuit, decided on June 9th, 1995, that even though cordless phone communications represent oral communications within the meaning of the statute, a protection of the statutes were limited to communication in which there is an expectation of privacy, and cordless telephones are broadcast over radio waves to all who wish to overhear. See also *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507 (1967).

The pleading of Mr. Keller indicates confusion as to whether a cordless or a wire phone was allegedly used.

In discussing the *Federal Wiretap Act*, 18 U.S.C., Section 2516(2), the Louisiana Court held:

> **"Thus, although in this case we will deal primarily with Louisiana statutes, we remain mindful of the fact that federal law is ultimately controlling in this area and that our construction of Louisiana's Electronic Surveillance Act should reflect an awareness of the purpose underlying the comprehensive federal scheme of which it is a part."**

In *United States v. Smith*, 978 F.2d 171 (5th Cir. 1992), the court took notice of the fact that congress apparently did not wish to criminalize the interception of radio

transmissions which were easily picked up by AM scanners, other cordless handsets or any number of ubiquitous and mundane radio receivers commonly found in the ordinary American household which are capable of intercepting such transmissions. Yet, the Louisiana statute does make illegal the use of electronic devices commonly used and found in American households on a daily basis. Certainly, the Louisiana Legislature did not intentionally intend to protect public officials allegedly engaging in illegal activity through use of the public airwaves or wire transmissions to further such activity.

In *Smith* the court stated that:

> **"The conversations which took place were not protected under Art. 1 Section 5 of the Louisiana Constitution, nor were they protected under the 4th and 14th Amendments of the United States Constitution. Nor was the conversation protected under the act because there was 'no reasonable expectation of privacy.' "**

The Louisiana Statute, in fact, seems to do otherwise. The Louisiana Act (LA R.S. 15:1301, et seq.) would seem to protect public officials using public airwaves to violate public laws on issues of public concern. This act would impede this information being published by news sources, thus, would be kept secret. This would be true even if the disclosure was truthful, lawfully obtained (by the disclosure), and a matter of public concern. This act violates free speech.

The Louisiana act appears to be in conflict with 18 U.S.C., Section 2702(5)

Disclosure of Contents:

"As may be necessarily incident to the rendition of the service or to the protection of the rights or property of the provider of that service; or

(B) Appear to pertain to the commission of a crime."

The above section of 18 U.S.C. Section 2702 sets forth authorization for disclosure and use of intercepted wire, oral, or electronic communications.

Thus, the federal statute allows the disclosure of contents, in fact, when there is an inference or an appearance that a crime is in commission; as an exception to the general statute. An ordinary citizen, much less, a local newspaper would appear to have an obligation to disclose and/or to publish information involving the commission of a felony, especially on issues of public concern and possibly involving public officials. If not, would such an individual who has knowledge of such information, be guilty of **"misprision of a felony"?**

Carpenter v. State, 36 S.W. 900, 62 Ark. 286, held that, to-wit:

"It is the duty of everyone, seeing any felony attempted, by force to prevent it; and one who fails to discharge such duty is guilty of a misdemeanor called "misprision of a felony."

Under LA. R.S. 15:1303(B), the Louisiana Statute provides for not more than a $10,000.00 fine and imprisoned for not less than 2 years, no more than 10 years, without the benefit of probation, parole, or suspension of sentence. To the contrary, 18 U.S.C. Section 2510, et seq.

provides that the federal government would be entitled to the appropriate injunctive relief and poses a civil fine of not less than $500 for each violation of such injunction. The statute also provides that the defendant shall be fined under this title or imprisoned for not more than one year or both. The Louisiana statute imposes a mandatory 2 to 10 years sentence for a first offender for violation of the statute, and as such, is overly harsh, cruel, and substantially unusual punishment.

The 8th Amendment (applied to state's via the 14th Amendment) to the United States Constitution forbids cruel and unusual punishment which includes excessive punishment. *Robertson v. California*, 370 U.S. 660, 82 S.Ct. 1417, Art. 1, s.20 of the Louisiana Constitution expressly forbids cruel, excessive or unusual punishment.

State v. Beavers, 382 So.2d 943, a Louisiana case which held that, to-wit:

> **"Punishment is excessive 'if it is grossly out of proportion to the severity of the crime of if it is nothing more than the purposeless and needless imposition of pain and suffering."**

Under LA R.S. 15:1304(A), states, to-wit:

> **"It shall be unlawful for any person willfully to manufacture, assemble, possess, or sell any electronic, mechanical, or other device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of surreptitious interception of wire or oral communications."**

Thus, it would appear, the Louisiana statute holds liable, as a violator of this act, any housewife, child, or

other individual who merely owns or possesses a radio scanner, a television set, or any electronic or other device which is capable of intercepting the airwaves.

Free Speech or the First Amendment protections are violated by the Louisiana statute. *Hustler Magazine and Larry C. Flynt v. Jerry Falwell,* (1987) Decision (1988), 485 U.S. 46, 108 S.Ct. 876.

> **"The Supreme Court, in interpreting the First Amendment, recognized the fundamental importance of the free flow of ideas and opinions on matters of public concerning interest. The freedom to speak one's mind is not only an aspect of individual liberty and thus a good unto itself, but also is essential to the common quest for truth and the validity of society as a whole."**

See also *New York Times Company v. L. B. Sullivan,* 376 U.S. 254, 84 S.Ct. 721.

> **"Criticism of public officials will not always be reasonable or moderate; public figures as well as public officials will be subject to vehement, caustic, and sometimes unpleasant sharp attacks. A candidate who vaunts his spotless records sterling integrity cannot convincingly cry 'foul' when an opponent or an industrious reporter attempts to demonstrate to the contrary."** See *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 91 S.Ct. 621.

See also *Garrison v. Louisiana,* 379 U.S. 64, 85 S.Ct. 209.

See also *Cox Broadcasting Corp. v. Cohn,* (1974) 420 U.S. 469, 95 S.Ct. 1029, concerning matters which are of a public record.

Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S.Ct. 1975, stands for the proposition that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. The defamed public official or public figure must prove not only that the publication is false, but that it was knowingly so, or was circulated with reckless regard for its truth or falsity.

CONCLUSION

LA R.S. 15:1301-1312 is unconstitutional, in that, it violates the First Amendment of the United States Constitution and suppresses Free Speech, and also, contains mandatory imprisonment of 2 to 10 years at hard labor for each count of violation, which is in itself, cruel and unusual punishment. Judge Hand in the case of *NAACP v. Button,* 371 U.S. 415, 83 S.Ct. 328, stated that, to-wit:

> **"The First Amendment presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many, this is and always will be, folly; but we have staked upon it our all."** See also, *United States v. Associated Press,* 52 F.Supp. 362.

Whitney v. California, 274 U.S. 357, 47 S.Ct. 641.

It is worth repeating what the court held:

> **"Believing in the power of reason as applied through public discussion, they eschewed**

silence coerced by law – the argument of force in its worse form."

The Louisiana statute violates both our First and our Fourteenth Amendment rights. If public officials use public airwaves to discuss the public's business, laws should not be passed to keep secret the voices of such elected officials. Such laws and statutes violate Freedom of Speech and our First Amendment and Fourteenth Amendment protections. The U.S. Supreme Court has adopted the strict standard in similar cases. *Cox v. Cohn,* 420 U.S. 469. The government has only allowed such restricted speech when *"a state can show an interest of the highest order."*

Justice Goldberg in *Whitney v. California* stated that:

"I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions or its officials. For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it. An unconditional right to say what one pleases about public affairs is what I consider to be the minimum guarantee of the First Amendment."

This act would seem to protect any public officials using public airwaves while discussing possible wrongful

activities on matters of public concern even if the information was lawfully obtained and truthful. Certainly, this statute cannot meet the strict standard test nor can the state of Louisiana show *"an interest of the highest order."*

For the foregoing reasons, the Petition for Writ of Certiorari should be granted, LA R.S. 15:1301, et seq. statute should be held in violation of First Amendment rights of Free Speech and containing statutorial penalties which are cruel and unusual.

Respectfully submitted,

By Attorney,
CAROL J. AYMOND, JR.
In Proper Person
Louisiana Bar No. 02626
Post Office Box 117
Bunkie, LA 71322
Telephone: (318) 346-6613